A **COMMERZBANK (SOUTH EAST ASIA LTD)**

v.

TOW KONG LIANG

B COURT OF APPEAL, PUTRAJAYA
HELILIAH MOHD YUSOF JCA
KN SEGARA JCA
RAMLY ALI JCA
[CIVIL APPEAL NO: J-02-161-2002]
C 18 JANUARY 2011

CIVIL PROCEDURE: *Reciprocal enforcement of judgments - Setting aside registration of foreign judgment - Application for registration of Singapore judgment in Malaysia - Whether writ of summons and order* D *of Singapore court served through private agent - Whether service contrary to O. 65 rr. 2 & 3 Rules of the High Court 1980 - Whether enforcement of Singapore judgment contrary to public policy in Malaysia*

The defendant applied to set aside the registration of a Singapore E judgment against him under s. 5 of the Reciprocal Enforcement of Judgments Act 1958 ('Act 99'). The defendant claimed that he had not submitted to the jurisdiction of the Singapore court since he had not appeared or taken part in the proceedings therein. Further, the sealed copy of the writ of summons issued by the F Singapore court and a copy of the order of the Singapore court had been served by a private agent contrary to O. 65 of the Rules of the High Court 1980 ('RHC'). The High Court allowed the application to set aside the judgment. The basis of the judgment was that non-adherence to O. 65 r. 2 of the RHC constituted an exercise of sovereignty being made in Malaysia G without its consent and hence rendered it contrary to public policy. Hence this appeal.

Held (allowing the appeal with costs)
Per Heliliah Mohd Yusof JCA delivering the judgment of the H **court:**

(1) The RHC 1980 now permits the mode of service to be effected by an agent and hence a method authorised by the law where the Malaysian process is to be served abroad. I O. 10 r. 1 RHC 1980 recognizes service by an agent. The law in Malaysia and Singapore have rendered such recognition.

Order 65 is not exclusive. No issue of violation of sovereignty therefore arose for this was a situation where both Malaysia and Singapore recognized the mode of service. (para 22)

(2) The process had been served "in accordance with the law of the country of the original court" that is Singapore. There was no suggestion that the defendant did not have sufficient time to enable him to defend the proceedings in whatever way necessary. (para 26)

Bahasa Malaysia *Translation Of Headnotes*

Defendan memohon untuk mengenepikan pendaftaran penghakiman Singapura terhadapnya di bawah s. 5 Akta Penguatkuasa Salingan Hukuman 1958 ('Akta 99'). Defendan memohon bahawa beliau tidak menyerah kepada bidangkuasa mahkamah Singapura kerana beliau tidak menghadirkan diri atau mengambil bahagian di dalam prosiding-prosiding. Lagipun, salinan termeterai writ saman yang dikeluarkan oleh mahkamah Singapura dan salinan perintah mahkamah Singapura yang diserahkan oleh agensi swasta bertentangan dengan A. 65 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Mahkamah Tinggi membenarkan permohonan untuk mengenepikan penghakiman. Dasar penghakiman adalah ketidakpatuhan A. 65 k. 2 KMT menjadikan perlaksanaan kedaulatan diperbuatkan di Malaysia tanpa persetujuannya maka menyebabkan ia bertentangan dengan polisi awam. Oleh itu rayuan ini.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Heliliah Mohd Yusof HMR menyampaikan penghakiman mahkamah:

(1) KMT 1980 pada masa ini membenarkan cara penyampaian dilakukan oleh seorang ejen maka ia adalah satu kaedah yang diberikuasa oleh undang-undang proses penyampaian ke luar negara Malaysia. Aturan 10 k.1 KMT 1980 mengiktiraf penyampaian oleh seorang ejen. Undang-undang di Malaysia dan Singapura telah menyebabkan pengiktirafan sedemikian. Aturan 65 bukan ekslusif. Isu pencabulan kedaulatan tidak timbul kerana ini adalah satu keadaan di mana kedua-dua Malaysia dan Singapura mengiktiraf cara penyampaian.

A **(2)** Proses telah disampaikan 'sejajar dengan undang-undang negara mahkamah asal' iaitu Singapura. Tiada cadangan yang defendan tidak mempunyai cukup masa untuk pembelaan prosiding dalam apa juga cara perlu.

B **Case(s) referred to:**
Afro Continental Nigeria Ltd v. The Meridian Shipping Co SA [1982] 2 Lloyd's Rep 241 ***(refd)***
Besant v. Wood [1879] Ch Div 608 ***(refd)***
Cheng Swee Tiang v. PP [1964] 1 LNS 19 FC ***(refd)***
D v. National Society for the Prevention of Cruelty to Children [1977] 1 All
C *ER 589* ***(refd)***
Fortune Hong Kong Trading Ltd v. Cosco Feoso (Singapore) Pte Ltd [2000] 2 SLR 717 ***(refd)***
Ngan Chin Wen v. Panin International Credit (S) Pte Ltd [2003] 3 CLJ 569 CA ***(refd)***
D *Sunkyong International Inc v. Malaysia Rubber DVPT Corp Bhd [1992] 3 CLJ 1531; [1992] 1 CLJ (Rep) 310 SC* ***(refd)***
United Overseas Bank Limited v. Wong Hai Ong [1999] 5 CLJ 405 HC ***(refd)***

Legislation referred to:
E Reciprocal Enforcement of Judgment Act 1958, ss. 3(3), 4, 5(2)(a)(i)
Rules of the High Court 1980, O. 10 r. 1, O. 11 rr. 5(8), 6(1)(b)(ii), (2)(b)(ii), O. 65 rr. 2(3), 3(3)

For the appellant - Rabindra Nathan (S Bhuvaneswary with him); M/s Shearn Delamore & Co
F *For the respondent - Dato' MS Murthi; M/s Chambers of Murthi & Partners*

[Appeal from High Court, Johor Bahru; Originating Summons No: MT2-24-1794-1999]

Reported by Amutha Suppayah
G

JUDGMENT

Heliliah Mohd Yusof JCA:
H

[1] This appeal has arisen from an order of the High Court dated 9 January 2002 to set aside the registration of a judgment by the Singapore High Court pursuant to s. 4 of the Reciprocal Enforcement of Judgment Act 1958 (the 1958 Act). The appellant
I and respondent in this appeal is to be referred to hereinafter as the plaintiff and defendant respectively.

[2] The following is the background leading to the appeal. The plaintiff on 11 November 1998 filed an action in the High Court Singapore (the Singapore writ) against, *inter alia*, the defendant pursuant to a guarantee agreement dated 18 April 1998 concluded between the plaintiff and defendant. On 12 November 1998 the High Court in Singapore granted the plaintiff leave to serve the Singapore writ out of jurisdiction on the defendant (the Singapore order). An advocate and solicitor of the High Court of Malaya who knows the defendant personally served on the defendant the Singapore writ and Singapore order as aforesaid.

[3] On 26 January 1999 a judgment in default of appearance was entered into against the defendant by the High Court, Singapore (the Singapore judgment). On 27 September 1999 the plaintiff filed an application in the High Court Malaya to register the Singapore judgment pursuant to s. 4 of the 1958 Act which judgment was on 17 February 2000 accordingly registered (the Registration Order) by the High Court Malaya.

[4] However the defendant on 24 June 2000 filed an application pursuant to s. 5 of the 1958 Act to set aside the registration order. On 9 January 2002 the registration order was set aside. Hence the appeal before us.

The Judgment Of The High Court

[5] The complaints in this appeal emanate from the grounds furnished by the learned High Court in setting aside the registration order. For the purpose of addressing the issues in this appeal reference may be made to the following portions of the grounds of judgment of the High Court where the learned trial judge has relied upon the provisions of O. 65 r. 2 of the Rules of the High Court 1980 (RHC 1980) in setting aside the registration order. Since the grounds of judgment has set out those very provisions the material portions of the judgment may be referred to as follows:

> Order 65 r. 2 of the Rules of the High Court 1980 therefore made provision for the service of foreign legal process, including citations in Malaysia. It is as follows:
>
> 2 Service of foreign legal process (O. 65 r. 2)
>
> (1) This rule applies in relation to the service of any process required in connection with civil proceedings pending before a court or other tribunal of a foreign country where a letter

of request from such a tribunal requesting service on a person in Malaysia of any such process sent with the letter is received by the Minister and is sent by him to the High Court with an intimation that it is desirable that effect should be given to the request.

(2) In order that service of the process may be effected in accordance with this rule the letter of request must be accompanied by a translation thereof in English, by 2 copies of the process to be served and by 2 copies of a translation of the process in English.

(3) Subject to paragraph (4) and to any written law which provides for the manner in which documents may be served on bodies corporate, service of the process shall be effected by leaving a copy of it and of the translation with the person to be served.

Service shall be effected by the process server.

(4) Where an application in that behalf is made by the Attorney General, the Court may make an order for substituted service of the process, and, where such an order is made, service of the process shall be effected by taking such steps as the Court may direct to bring the process to the notice of the person to be served.

(5) After service of the process has been effected or (if such be the case) attempts to effect service of it have failed, the process server shall file a copy of the process, an affidavit made by the person who served, or attempted to serve, the process stating when, where and how he did or attempted to do so, a copy of that affidavit and a statement of the costs incurred in effecting, or attempting to effect, service.

(6) The Registrar shall give a certificate in Form 144:

(a) identifying the documents annexed thereto, that is to say, the letter of request for service, a copy of the process received with the letter and a copy of the affidavit referred to in paragraph (5);

(b) certifying that the method of service of the process and the proof of service are such as are required by the rules of the High Court regulating the service of process of the Court in Malaysia or, if such be the case, that service of the process could not be effected for the reason specified in the certificate; and

(c) certifying that the cost of effecting, or attempting to effect, service is the amount so specified.

(7) The certificate given under paragraph (6) shall be sealed with the seal of the High Court for use out of the jurisdiction and shall be sent to the Minister.

A letter of request from a court or other tribunal of a foreign country requesting service upon a person in Malaysia must be received by the Minister who sends the same to the High Court with an intimation that it is desirable that effect should be given to the request. Service will then be effected by the process server. This procedure embodies the giving of consent to the exercise of sovereignty in Malaysia by the foreign country by the service of the process of its court or other tribunal. Clearly the procedure under O. 65 r. 2 had not been complied with.

Order 65 of the Rules of the High Court 1980 provides an alternative to the above, as follows:

3 Service of foreign legal process under Civil Procedure Convention (O. 65 r. 3)

(1) This rule applies in relation to the service of any process required in connection with civil proceedings pending before a court or other tribunal of a foreign country, being a country with which there subsists a Civil Procedure Convention providing for service in Malaysia of process of the tribunals of that country, where a letter of request from a consular or other authority of that country requesting service on a person in Malaysia of any such process sent with the letter is received by the Registrar.

(2) In order that service of the process may be effected in accordance with this rule the letter or request must be accompanied by a copy of a translation of the process to be served in English.

(3) Subject to any written law which provides for the manner in which documents may be served on bodies corporate and to any special provisions of the relevant Civil Procedure Convention, service of the process shall be effected by leaving the original process or a copy of it, as indicated in the letter of request, and a copy of the translation with the person to be served.

A Service shall be effected by the process server.

(4) After service of the process has been effected or (if such be the case) attempts to effect service of it have failed, the process server shall file an affidavit made by the person who served, or attempted to serve, the process
B stating when, where and how he did or attempted to do so, and a statement of the costs incurred in effecting, or attempting to effect, service.

(5) The Registrar shall give a certificate certifying:

C (a) that the process or a copy thereof, as the case may be, was served on the person, at the time, and in the manner, specified in the certificate or, if such be the case, that service of the process could not be effected for the reason so specified; and

D (b) that the cost of effecting, or attempting to effect, service is the amount so specified.

(6) The certificate given under paragraph (5) shall be sealed with the seal of the High Court for use out of jurisdiction and shall be sent to the consular or other
E authority by whom the request for service was made.

Thus where there is a Civil Procedure Convention between the foreign country and Malaysia, the request, with minor difference from the O. 65 r. 2 procedure, may be made directly to the
F Registrar by way of a request from a consular or other authority of that foreign country.

The plaintiff had not complied with either one of these two alternatives and it would be contrary to public policy in Malaysia to allow the enforcement of the judgment which was obtained
G consequent upon a failure to observe the said rules. The application by the defendant in enclosure 11 is therefore allowed and the registration in Malaysia of judgment No. 2059 dated 26 January 1999 of the High Court of Singapore is set aside with costs.

H **[6]** Before dealing with the issue on the application of O. 65 r. 2 it is necessary to deal with an issue that has been disposed of by the trial judge so that it dispels any uncertainty related to the judgment having been obtained in default. The learned trial
I judge had amply referred to a clause in the guarantee dated

18 April 1996 signed by the defendant to guarantee a loan facility to Vastar Group Limited BVI the first defendant named in the Singapore writ specifically incorporates cl. 29 that states:

> 29. Governing Law and Jurisdiction
>
> This guarantee shall be governed by and construed in accordance with the laws of Singapore and it is irrevocably agreed by the Guarantor for the exclusive benefit of the Bank that the courts of Singapore are to have jurisdiction to settle any disputes which may arise out of or in connection with this guarantee and that accordingly any suit action or proceeding arising out of or in connection with this guarantee (in this Clause referred to as "Proceedings") may be brought in such courts and nothing in this Clause shall limit the right of the Bank to take Proceedings against the Guarantor in the courts of any other jurisdiction in which the Guarantor has assets or a place of business or in any other court which has competent jurisdiction over the Guarantor.
>
> The Guarantor irrevocably agrees that an appeal from the decision of the appellate court in Proceedings in Singapore may be brought by the Bank before the Judicial Committee of the Privy Council and agrees to be bound by the decision of the Judicial Committee of the Privy Council in such appeal.
>
> In the light of Clause 29 of the guarantee signed by the Defendant, section 5(2)(a)(i) is irrelevant. Since the Defendant had, before the commencement of the proceedings specifically agreed, in respect of the subject matter of the proceedings under the guarantee, to submit to the jurisdiction of the courts of Singapore, the Defendant is caught by section 5(2)(a)(iii) whereby the Singapore court shall be deemed to have jurisdiction. That the Defendant had neither appeared nor taken a substantive part in the proceedings in the Singapore Court is therefore immaterial.

[7] This part of the judgment dealt with s. 5(2)(a)(i) of the Reciprocal Enforcement of Judgments Act, 1958 (Revised 1972) (Act 99). No further question should therefore be entertained in relation to the matter of the judgment having been obtained in default of appearance and the question of the jurisdiction of the Singapore High Court.

[8] Reliance has been emplaced primarily on the decision in *Afro Continental Nigeria Ltd v. The Meridian Shipping Co SA* [1982] 2 Lloyd's Rep 241 and the then Supreme Court decision in

Sunkyong International Inc v. Malaysia Rubber DVPT Corp Bhd [1992] 3 CLJ 1531; [1992] 1 CLJ (Rep) 310. The observation that is particularly relevant to the appeal before us is the following observation:

> As regards the particular procedural point mentioned at the outset, it concerns the actual method of service of the notice of the writ out of jurisdiction after an order of service out of jurisdiction is granted. This is provided by O. 11 r. 6 in particular, depending on whether or not there subsists the Civil Procedure Convention in that foreign country where the service out of jurisdiction is intended to be effected. In the instant appeal, it was common ground and we accepted that in the USA, there did not subsist the Civil Procedure Convention, therefore O. 11 r. 6(2) applied. The service of the notice of writ herein would have to be effected through the Government of the USA or through our Malaysian consular authority contrary to what was ordered and done in this case, as stated above.
>
> The rationale behind this prescribed method of service is of course that our courts do not exercise their judicial powers beyond their territorial limits, and further service of judicial process in a foreign country, to use the grave words of Lord Denning in Afro Continental Nigeria Ltd v The Meridian Shipping Co SA is an exercise of sovereignty in that country, which can only be done with the consent of that country.
>
> [per Peh Swee Chin SCJ (as he then was)].

[9] The judicial approach in *Sunkyong*'s case has, also been adopted in the decision of Ian Chin J (as he then was) in *United Overseas Bank Limited v. Wong Hai Ong* [1999] 5 CLJ 405.

[10] The decision in *Sunkyong*'s case dealt with the effect of O. 11 r. 6(2). In 2000 an amendment was introduced, *inter alia*, *vide* PU(A) 342/2000 to O. 11 r. 6 with regard to the service of notice of writ abroad. The amendments permitted the notice, in the circumstances prescribed in O. 11 r. 6(1) and (2), to be served by the plaintiff or his agent (r. 6(1)(b)(ii)) and (r. 6(2)(b)(ii)) respectively. It is not to be overlooked however that where the defendant is in Singapore or Brunei O. 11 r. 5(8) has also provided a specific mode of service of the notice of a Malaysian writ.

[11] It has been urged upon us that the issue in this appeal deals with the converse situation that is the acceptance (or recognition) of a foreign process. A

[12] Order 65 relates expressly to the service of foreign process in two situations. One situation is when in respect of the service of process required in connection with civil proceeding pleading before a court or other tribunal of a foreign country, a letter of request from such tribunal requesting service on a person in Malaysia is sent to a Minister who then transmits it onwards to the court. The second situation is where the service of process required in connection with civil proceedings in a foreign country is a country with which there subsists a Civil Procedure Convention, providing for service in Malaysia of the process. It is observed that in both situations it is also expressly stated that service shall be effected by the process server (see O. 65 r. 2(3) and O. 65 r. 3(3)). The issue therefore arises whether this rule in the words of learned counsel of the appellant is "exclusive"? B C D

Our Appraisal

[13] As noted above, the trial judge invoked O. 65 r. 2 of the Rules of the High Court 1980 (RHC 1980) as the reason for setting aside the Registration Order. In a nutshell, the basis of the judgment is that non adherence to O. 65 r. 2 constitutes an exercise of sovereignty being made in Malaysia without its consent and hence renders it contrary to public policy. It is also relevant to refer to s. 5 of Act 99 relied upon by the trial judge. Section 5 provides, *inter alia*: E F

> 5. (1) On an application in that behalf duly made by any party against whom a registered judgment may be enforced. The registration of the judgment: G
>
> (a) shall be set aside if the registering court is satisfied:
>
> ...
>
> (v) that the enforcement of the judgment would be contrary to public policy in Malaysia; or ... . H

[14] Section 5 is a provision under Part II of Act 99. Part II also includes s. 3 which includes, *inter alia*, the provision "(1) This Part shall extend to judgments given in the superior courts of I

A reciprocating countries." The term "reciprocating country" means any country or territory including the United Kingdom to which this Act for the time being applies and which is specified in the First Schedule. The First Schedule indicates that Singapore is included one of the reciprocating countries. Thus Act 99 is a
B legislation that facilitates the registration of foreign judgments with the object of attaining reciprocity in treatment.

[15] The setting aside of the registration order is premised on the non compliance of O. 65 r. 2 and hence contrary to public policy.
C The term "public policy" is not defined in Act 99. Francis Bennion on *Statutory Interpretation* states, *inter alia*:

> A principle of statutory interpretation embodies the policy of the law, which is in turn based on public policy. The court presumes, unless the contrary intention appears, that the legislative intended
D to conform to this legal policy. A principle of statutory interpretation can therefore be described as a principle of legal policy formulated as a guide to legislative intention.

It is also further explained as follows:

E > It is necessary to remember the juridical distinction between principles and rules. A rule binds, but a principle guides: *principiorum non est ratio*. If an enactment incorporates a rule, it makes that rule binding in relation to the purposes of the Act. But if it attracts a principle it leaves scope for flexible application. The
F clue is given by this. General principles of law and public policy underlie and support the rules laid down by the whole body of legislation. If it were not so the rules would be merely arbitrary.

[16] The pertinent question here is what is meant by the term "public policy". In *Cheng Swee Tiang v. PP* [1964] 1 LNS 19, Wee
G Chong Jin CJ observed:

> ... the use of the doctrine of public policy has consistently been frowned upon by the courts. Burrough J. (quoting Hobart C.J.) said of it in *Richardson v. Mellish* "Public policy is an unruly
H horse, and difficult to ride." Parke B. said of it in *Egerton v. Brownlow* "Public policy is a vague and unsatisfactory term ...; it is capable of being understood in different senses, it may, and does, in its ordinary sense, mean 'political expedience', or that which is best for the common good of the community; and in that sense there may be every variety of opinion, according to
I education, habits, talents, and dispositions of such person, who is to decide, whether an act is against public policy or not. To allow

this to be a ground of judicial decision, would lead to the greatest uncertainty and confusion". More recently Lord Atkin in *Fender v. Mildmay* said of it "... the doctrine should only be invoked in clear cases in which the harm to the public is substantially incontestable ..." .

[17] The following precedents further explain the doctrine. In *Besant v. Wood* [1879] Ch Div 608 Jessel MR stated:

> The suit raises points of the very greatest importance as regards the general law, upon which I can give my opinion and I say my opinion advisedly, because I am free to confess that the law is not so clearly settled on the point that the Judge can lay down the law; he can only give his opinion of the law. Judicial opinion has varied a great deal, and must vary a great deal, when you consider the ground upon which that judicial opinion or those judicial opinions have been founded. This is a branch of law which depends upon what is commonly called "public policy". Now you cannot lay down any definition of the term "public policy," or say it comprises such and such a proposition, and does not comprise such and such another: that must be, to a great extent, a matter of individual opinion, because what one man, or one Judge, and perhaps I ought to say one woman also in this case, might think against public policy, another might think altogether excellent public policy. Consequently it is impossible to say what the opinion of a man or a Judge might be as to what public policy is.

[18] In *D v. National Society for the Prevention of Cruelty to Children* [1977] 1 All ER 589 at 609, per Lord Hailsham of St Marylebone stated:

> ... the development of the law has generally been judicial; Parliamentary intervention is likely to be at best occasional and delayed; and the Law Commissions do not appear to have taken cognisance of the problem.
>
> Nevertheless, invocation of 'public policy' does impose even more than normal self-restraint on a court. Of course, every rule of law is a legal manifestation of public policy. But your Lordships are, as counsel for the respondent rightly emphasized, instantly concerned with 'public policy' in a narrower sense, namely consideration of social interests beyond the purely legal which call for the modification of a normal legal rule (here the rule that all relevant evidence should be adduced to the court): cf Lord Wright in *Fender v. Mildmay* [1937] 3 All 402 at 424; 425 [1938] AC 1

A at 38. In such circumstances the correct approach to the function of the courts, is, in my view, expressed by Lord Thankerton in *Fender v. Mildmay* [1937] 3 All ER 402 at 414, [1938] AC 1 at 23:

> Their duty is to expound, and not to expand, such policy.
B That does not mean that they are precluded from applying an existing principle of public policy to a new set of circumstances, where such circumstances are clearly within the scope of the policy.

C **[19]** In this appeal the approach has been taken that non adherence to a rule of procedure, that is service of a foreign process, constitutes a violation of sovereignty. In other words the doctrine of "public policy" has been entwined with the principle of sovereignty of a state through the mechanism of the service of
D process which processes are steps undertaken preceding to the judgment itself being obtained.

[20] Two observations may be made. The decision in *Sunkyong*'s case was applied in the *United Overseas Bank Ltd* case. The former needs to be given an analysis. *Sungkyong*'s case pertains to O. 11
E r. 6(2) which has since been amended and hence no longer creates good precedent. The decision in the *United Overseas Bank Ltd* case merely applied the *Sunkyong*'s case without really considering whether non adherence to O. 65 in essence really constitutes something which is contrary to public policy the policy
F being that there a violation of Malaysia's sovereignty. Secondly, the Court of Appeal in *Ngan Chin Wen v. Panin International Credit (S) Pte Ltd* [2003] 3 CLJ 569 in the majority decision opined that in view of conflicting High Court decisions a ruling was made, *inter alia,* that non adherence to O. 65 is *ultra vires* RHC 1980 on the
G ground that the procedure allowing for service of a writ in Malaysia by a private agent was allowed only in respect of processes originating in Malaysia and not foreign processes. However the dissenting judgment of Abdul Aziz JCA (as he then was) also merits further scrutiny.

H **[21]** The observations of his Lordship that elicit the issue further are in the following terms:

> According to O. 11 r. 3(8)(a) of the Singapore Rules, 'Where the defendant is in Malaysia or Brunei Darussalam, the originating
I process ... may be served in accordance with r 4'. Paragraph (2) of r. 4 provides for the manner of serving an originating process

on a defendant in any country with respect to which there does not subsist a Civil Procedure Convention providing for service in that country of process of the Singapore High Court. There was no dispute that Malaysia is such a country. Paragraph (2) of r. 4 provides for three modes of service, mode (c) being 'by a method of service authorized by the law of that country for service of any originating process issued by that country'.

[22] As already also indicated above the RHC 1980 now permits the mode of service to be effected by an agent O. 11 r. 6(2) and hence a method authorised by the law where the Malaysian process is to be served abroad.

[23] His Lordship then further noted:

If the question of service that arose in this case in relation to the question of the jurisdiction of the Singapore High Court fell to be decided on the basis of O. 65 of the RHC, then of course service by agent would not be an authorized mode of service because under O. 65 service must be by a process server. But O. 65 does not come into play in the question of service in this case. Order 65 concerns service of a foreign writ in Malaysia, whereas, as has been seen, service for the question of jurisdiction of the Singapore High Court is service in the circumstances authorized or manner prescribed by the Singapore Rules, and the effect of O. 11 r. 3(8)(a) and r. 4(2)(c) of the Singapore Rules is, where the defendant is in Malaysia, to authorize a method of service that is authorized by the law of Malaysia for service of any originating process issued by Malaysia - not by another country - and our O. 10 and O. 11 either allows, by not prohibiting, service by an agent where service of the Malaysian process is to be in Malaysia or expressly allows service by an agent where the Malaysian process is to be served abroad.

I would not like to leave O. 65 of the RHC and *Commerzbank* without observing that O. 65 does not lay down that its provisions constitute the only allowed mode of service of a foreign process in Malaysia. Rules 2 and 3 are the material provisions. Paragraph (1) of r 2 states:

(1) ...

Paragraph (1) of r 3 states:

(1) ...

It is obvious from the words that I have emphasized that the provisions of rr. 3 and 4 are to apply only in cases where, to put it simply, there is a government-to-government request for

A service of a foreign process on a person in Malaysia. Order 65 of the RHC does not lay down that service of a foreign process in Malaysia may only be done on a government-to-government request.

B **[24]** The reasoning of his Lordship may also gleaned from the Singapore case of *Fortune Hong Kong Trading Ltd v. Cosco Feoso (Singapore) Pte Ltd* [2000] 2 SLR 717. That case has also referred to the decision in *Sungkyong*'s case and LP Thean JA made the following statements relevant in the circumstances of this appeal:

C 25 The first thing to note is that both *Sunkyong* and *Chow* involve the interpretation of the respective provisions governing the service of process out of jurisdiction and they do not concern the interpretation of O. 65 or its Malaysian equivalent. It appears to us that the primary concern of the judges in these cases was that the procedure set out in
D O. 11 prescribing the methods of service of process in a foreign jurisdiction must be strictly adhered to. Understandably, they were sensitive to the possibility that the foreign state might view such a service of process as being an encroachment upon its sovereign rights.

E 26 What counsel for the respondents now seeks to do is to extrapolate a general principle from these cases to say that service of process on a foreign state must always be effected through official channels. To be more precise, his argument is that the service of any foreign process in Singapore would
F be an encroachment upon the sovereignty of Singapore, unless such service is effected through an official channel. We do not think that the principles enunciated in those cases necessarily lead to such a conclusion. Ultimately, it would depend on whether the country, where the service of process
G is to be effected, treats the service of process by a private agent as an encroachment upon its sovereign rights.

…

H 31 In our judgment, the service of foreign process in Singapore need not invariably go through official channels. As we have held, it clearly could not have been intended that O. 65 r. 2 should be an exhaustive and all-encompassing provision governing the service of all foreign processes in Singapore. Order 65 r. 2 applies only where a letter of request for service from a foreign court or tribunal is received by the
I Minister for Law and is subsequently sent by him to the Supreme Court with an intimation that it is desirable that effect should be given to the request. Where no such letter of request is received, r. 2 has no application.

...

34 We should add that quite apart from the fact that there is no clear principle of law in Singapore requiring all foreign process to be served through official channels, there does not appear to be any sound policy reason why we should require foreign litigants to comply with the more cumbersome formal procedure for service under O. 65. In this regard, it is important not to lose sight of the purpose of service of process, whether it be a foreign or local process. Essentially, it is no notify the defendant of the proceedings that have been commenced against him, and in our view, a more pertinent consideration is whether the method of service employed by the plaintiff is sufficient to bring to the attention of the defendant such proceedings and not whether the service is effected through the official means.

35 In our judgment, in the case of service of the foreign process emanating from a court or tribunal of a non-convention country, where no letter of request is issued by such court or tribunal, the service should be effected by personal service on the defendant in accordance with O. 10 r. 1, read with O. 62 and, in the case of a body corporate, read with the relevant provisions of the Companies Act (Cap 50). Although these rules by their express terms apply only to an originating process issued locally, we see no reason in principle why that mode of service prescribed for service of an originating process issued in Singapore cannot and should not be followed and adopted in the absence of any rule of procedure to the contrary. This mode of service fulfils, at least, the vital function of service of legal process.

36 Counsel for the respondents seeks to impress upon us that such a conclusion would effectively render O. 65 r. 2 nugatory, as foreign litigants would prefer to effect the service of foreign process through private agents instructed by them rather than through the Supreme Court. Such a conclusion is premised on the fact that a foreign litigant can comply with the service requirements of the foreign jurisdiction by not serving through official channels. This is not necessarily the case. One cannot readily assume that all foreign jurisdictions would accept service of process by private agents as being proper. Order 65 r. 2 therefore remains a facilitative provision which sets out an official channel for service of foreign process through the Singapore courts if the foreign jurisdiction requests for such service to be effected.

A We respectfully adopt the reasoning elucidated above. The total effect is that O. 10 r. 1 RHC 1980 recognizes service by an agent. It is also our view that the law in Malaysia and Singapore have rendered such recognition. Order 65 is not exclusive. No issue of violation of sovereignty therefore arises for this is a
B situation where both Malaysia and Singapore recognize the mode of service.

[25] There is another factor that should be balanced in the circumstances of this appeal, namely, the provision in s. 5(1)(a) iii
C of Act 99, that is another ground that permits the registering court to set aside a registered judgment. The provision is:

(iii) that the judgment debtor, being the defendant in the proceedings in the original court, did not (notwithstanding that
D the process may have duly served on him in accordance with the law of the country of the original court) receive notice of those proceedings in sufficient time to enable him to defend the proceedings and did not appear.

[26] In the circumstances of this appeal there is no doubt that
E the process has been served "in accordance with the law of the country of the original court" that is Singapore. In addition there is no suggestion that the defendant did not have sufficient time to enable him to defend the proceedings in whatever way necessary.

F **[27]** The defendant in this appeal has also attempted to raise other issues such as that the sum payable includes taxes or charges (see s. 3(3) of Act 99). In our view this is not an issue to be dealt with at this stage and should in fact have been ventilated at the High Court. Nevertheless it is not an issue that
G would affect our overall decision on the setting aside of the registration order. In our view there are parts of the judgment that can be truncated at the time of enforcement. It is not an issue that would be vitiate a registration order and in any case such question is an attempt to question an order made by a Singapore
H Court.

[28] In the final analysis we find that there are merits in the appeal and we find that for the reasons enunciated above the appeal is allowed with costs. The judgment of the High Court of
I 9 January 2002 is set aside and the registration order is reinstated.